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No. 758

In the Supreme Court of the United States

OCTOBER TERM, 1955

WILLIAM LUDWIG ULLMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and constitutional provisions involved	2
Statement	3
Argument	6
Conclusion	18

CITATIONS

Cases:

Adams v. *Maryland*, 347 U. S. 179	11
Barsky v. *United States*, 167 F. 2d 241	15
Blair v. *United States*, 250 U. S. 273	15
Brown v. *Walker*, 161 U. S. 591	5, 11, 12
Communications Association v. *Douds*, 339 U. S. 382	16
Counselman v. *Hitchcock*, 142 U. S. 547	14
Crowell v. *Benson*, 285 U. S. 22	10
Dennis v. *United States*, 341 U. S. 494	16
Feldman v. *United States*, 322 U. S. 487	11, 14
Hale v. *Henkel*, 201 U. S. 43	11
Hoffman v. *United States*, 227 U. S. 131	11
Jack v. *Kansas*, 199 U. S. 372	11
Lawson v. *United States*, 176 F. 2d 49, certiorari denied, 339 U. S. 934	15
Nelson v. *United States*, 201 U. S. 92	15
Regan v. *New York*, No. 51, this Term, decided April 25, 1955	11, 12, 13, 14
Shapiro v. *United States*, 335 U. S. 1	11
Smith v. *United States*, 337 U. S. 137	11
United States v. *C. I. O.*, 335 U. S. 106	10
United States v. *Josephson*, 165 F. 2d 82, certiorari denied, 333 U. S. 838	15

Cases—Continued Page
United States v. *McGovern*, 60 F. 2d 880 16
United States v. *Monia*, 317 U. S. 424 11
United States v. *Murdock*, 284 U. S. 141 13
United States v. *Rumely*, 345 U. S. 41 10
Constitution:
First Amendment 3
Fifth Amendment 3
Statute:
Immunity Statute, 68 Stat. 745, 18 U. S. C. A. 3486 (Supp. 1954) 2, 6, 8
Miscellaneous:
H. Rep. No. 2606, 83d Cong., 2d Sess. 8, 9
8 Wigmore, *Evidence* § 2192 (3d ed. 1940) 12

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 763

WILLIAM LUDWIG ULLMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals, not yet reported, are printed as an appendix to the petition (App. B). The opinion of the District Court granting the application of the United States Attorney under the immunity statute, Public Law 600, 83rd Cong., 68 Stat. 745 (1954), 18 U.S.C.A. § 3486 (Supp. 1954), for an order directing petitioner to testify is reported at 128 F. Supp. 617 and is printed in petitioner's appendix record (App. 36a).[1]

[1] The record filed by petitioner, the appendix to his brief as appellant in the Court of Appeals, is here referred to as "App." The two appendices to the petition are referred to as "App. A" and "App. B".

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1955 (App. B). The petition for a writ of certiorari was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether section (c) of the immunity statute charges the district court with the duty of determining the propriety of granting immunity in order to compel the testimony of a witness and thereby imposes upon it a non-judicial function.

2. Whether an immunity statute which provides absolute immunity from prosecution in exchange for testimony is invalid under the Fifth Amendment.

3. Whether a federal immunity statute must afford immunity from state prosecution.

4. Whether questions relating to Communist affiliations of petitioner and others are improper as immaterial and violative of the First Amendment.

5. Whether the District Court's order is deficient for failure to contain a grant of immunity.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The immunity statute, Public Law 600, 83rd Cong., 68 Stat. 745 (1954); 18 U. S. C. A. 3486 (Supp. 1954), is set forth as an appendix to the petition (App. A).

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

On November 3, 1954, petitioner appeared before a grand jury in the Southern District of New York. This grand jury was inquiring into matters involving the interference with and endangering of, and plans and attempts to interfere with and endanger, the national security and de-

fense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere. Petitioner refused to answer various questions relating to the subject matter of the inquiry, asserting his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States.

On November 10, 1954, the United States Attorney for the Southern District of New York presented to the District Court an application for an order instructing petitioner to testify and produce evidence pursuant to section (c) of the immunity statute, 18 U. S. C. A. § 3486, (Supp. 1954) (App. 2a). The application described the subject matter of the grand jury inquiry, set forth the questions asked petitioner by the grand jury, and stated that he refused to answer the questions on the ground that his answers would tend to incriminate him. The application averred that in the judgment of the United States Attorney the testimony of petitioner was necessary to the public interest and that the application was made with the approval of the Attorney General. It was accompanied by the latter's letter of approval (App. 7a).

Petitioner filed an affidavit in opposition to the application (App. 9a). Although, in the Government's view, this affidavit had no bearing upon the question before the court, counter affidavits were filed directed to certain charges which it

was felt should not go unanswered (App. 28a, 29a, 32a). Upon the request of the court, the United States Attorney filed an affidavit of good faith (App. 8a).

On January 31, 1955, after argument and the submission of briefs and the above affidavits, the court handed down an opinion sustaining the constitutionality of the immunity statute and granting the application (App. 36a). An order dated February 8, 1955, was issued by the court directing petitioner to appear before the grand jury and, pursuant to the statute, to answer the questions and testify and produce evidence with respect to the matters under inquiry (App. 55a).

On March 8, 1955, after persisting in his refusal to answer the questions put to him by the grand jury, petitioner was adjudged in contempt. The court entered judgment sentencing him to six months' imprisonment with the right to purge (App. 68a).

The Court of Appeals affirmed the judgment of the District Court in an opinion by Judge Frank expressly adopting the reasoning and conclusions of the District Court's opinion, with concurring opinions by Judge Clark and District Judge Galston (App. B). While the opinions expressed doubts as to the result as an original proposition, all held that the case was concluded by *Brown* v. *Walker*, 161 U. S. 591, and subsequent decisions of this Court.

ARGUMENT

1. Petitioner contends first (Pet. 6–11) that the immunity statute calls upon the district court to determine the propriety of granting immunity, that such a determination is a non-judicial function, and that the statute is therefore invalid. The argument, which strains after constitutional doubts from which the statute is free on its face, is without merit.

In unambiguous language, section (c) makes clear that the district court has no such function as petitioner suggests. To summarize its essential features, it provides: (1) There must be a proceeding before a grand jury or a case in the district court; (2) the subject matter must relate to interference with or endangering of, or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the like; (3) it must appear that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (4) the United States Attorney, with the approval of the Attorney General, shall make application to the court requesting that the witness be required to testify; and (5) upon order of the court the witness shall not be excused from testifying or producing evidence. Then follows the provision that the witness shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any

transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence.

There is no suggestion that after an application has been made in accordance with the statutory conditions outlined above, the district court is required or empowered to review the judgment of the United States Attorney or the Attorney General that the granting of immunity is appropriate. Nor, indeed, is the court required to grant immunity, for the immunity has been granted by Congress itself in the terms of the statute. Immunity follows as a matter of law when all the conditions have been met and the witness has testified in compliance with the order of the court.

In the absence of a statute granting immunity from prosecution to a witness who has validly asserted his privilege against self-incrimination, the courts lack power to compel him to answer. Under the present statute, the court is empowered to order the witness to answer when it appears (1) that the conditions specified in the statute and outlined above exist and (2) that there is no other legal objection to the compulsion of the witness' testimony. The order of the court gives assurance that the immunity power will not be dissipated in cases outside the framework of the congressional intent and that the witness will be

protected from subsequent prosecution touching the matters about which he is being compelled to testify. This construction of the statute, adopted by both courts below and plainly required by its language,[2] eliminates the need to consider the asserted constitutional problem which would arise if there were ground for the suggestion that the district court is called upon to determine the propriety of granting immunity.

The legislative history of the statute cannot justify petitioner's contrary conclusion. Nowhere in that history, which is reviewed in detail in the opinion of the district court (App. 49a–52a), is there any indication that Congress intended to require or permit a district court to substitute its judgment for that of the Attorney General and the United States Attorney as to whether the testimony of a witness before a grand jury is sufficiently necessary to warrant immunity. This may be readily illustrated by examination of the brief quotations petitioner selects (Pet. 7, 8) from the report on the bill which was enacted, H. Rep. No. 2606, 83d Cong., 2d Sess. The first of these quotations (Pet. 7), from p. 4

[2] Although sections (a) and (b) of the statute, dealing with witnesses before Congress or its committees, are not in this case, a comparison of them with section (c) underscores our position. As the district court observed (App. 46a–47a), these sections, providing that a court "may" issue an order and that an order requires the "approval" of the court, can be said to purport to vest discretion in the court (App. 46a–47a). There is no comparable language in section (c).

of the Report, merely affirms that the measure requires "application * * * to a court" an undisputed proposition which is of no help to petitioner. Petitioner then quotes from p. 8 of the Report where, with reference to witnesses *before committees of Congress*, it is said:

> Finally, before the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained.

As we have noted (*supra*, p. 8, n. 2), this observation is, if anything, adverse to petitioner's view since the provision regarding witnesses before grand juries significantly omits any requirement of "approval" by the district court. Nor, finally, is petitioner aided by his last quotation (Pet. 8), which consists of only the first sentence of the following paragraph from p. 8 of the Report:

> In cases before a grand jury or a court similar precaution exists. In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, having adjudged such testimony to be necessary in the public interest, must first obtain the approval of the Attorney General for such grant and then apply to the court for the necessary instruction to the witness to testify or produce evidence. All conditions must be complied with before the

grant of immunity can be given to the witness.

Read as a whole, this language hardly supports the thesis that the court is to have the duty of approving the propriety of granting immunity.

In short, as the district court concluded from its careful analysis (App. 52a), "The most that can be said for the legislative history is that it is on the whole inconclusive." On the other hand, the statute itself lends no support to the argument that constitutional doubt should be found by holding that the district court is required to judge the desirability from the viewpoint of the public interest of granting immunity. In the circumstances, the argument is decisively answered by the familiar teaching that "even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, 45; *United States* v. *U. I. O.*, 335 U. S. 106, 121. We think the construction found correct by the courts below is more than "fairly possible." It is the natural and reasonable import of the statutory language. But if the point were more doubtful, petitioner's effort to stretch the statute to the point of constitutional difficulty would remain futile.

2. The argument that the immunity statute violates the privilege against self-incrimination guaranteed by the Fifth Amendment is refuted by the decisions of this Court. Since *Brown* v. *Walker*, 161 U. S. 591 (1896), it has been firmly established that testimony may be compelled under a statute which affords "absolute immunity against future prosecution for the offence to which the question relates." *Counselman* v. *Hitchcock*, 142 U. S. 547, 586. The Act of 1893 upheld in *Brown* v. *Walker* served as the model for the statute here in issue as well as for immunity provisions appearing in a number of regulatory statutes. See *Shapiro* v. *United States*, 335 U. S. 1, 6. Recognizing that the statute here involved meets the established test, petitioner urges (Pet. 12) that *Brown* v. *Walker* should be overruled.

But, as all four of the judges below recognized (App. 39a, App. B, Pet. 23, 26, 27), the doctrine of *Brown* v. *Walker* not only remains unimpaired; it has been reenforced over the years by the decisions of this Court. *Hale* v. *Henkel*, 201 U. S. 43, 67-69; *United States* v. *Monia*, 317 U. S. 424, 428; *Smith* v. *United States*, 337 U. S. 137, 146-147; see, also, *Jack* v. *Kansas*, 199 U. S. 372; *Heike* v. *United States*, 227 U. S. 131; *Feldman* v. *United States*, 322 U. S. 487; *Shapiro* v. *United States*, 335 U. S. 1; *Adams* v. *Maryland*, 347 U. S. 179. And within the last month, subsequent to the decision of the court below, this Court (in *Regan*

New York, No. 54 this Term, slip op. p. 4) cited *Brown* v. *Walker* for the proposition that under the state immunity statute there involved (apart from the problem of waiver in that case), "it is clear beyond dispute that he would have had to testify; the statute would have provided him with immunity from prosecution on the matters on which his testimony was sought, and thus his testimony could not possibly have been self-incriminatory."

That conclusion controls this case. As in *Brown* v. *Walker* and in *Regan*, so here, the claim of constitutional privilege is defeated by the grant of immunity under which petitioner's testimony "could not possibly have been self-incriminatory." Because he was afforded the protection against self-incrimination the Constitution insures, petitioner could not refuse to answer questions on the ground of feared "legal, economic, social and political sanctions" (Pet. 12) any more than Regan could invoke the sanction of the strong public disfavor in which officials who deal in bribes are held. While one may not be forced to give testimony which may subject him to prosecution, it is also a salutary principle that, subject to this restriction, "the public has a right to every man's evidence."[3] Under the rule reaffirmed by this

[3] Lord Chancellor Hardwicke, in debate in the House of Lords (1742) on a Bill for Indemnifying Evidence, 12 Cobbett's *Parliamentary History* 675, quoted in 8 Wigmore, Evidence, § 2192 (3d ed., 1940).

Court only the other day in *Regan*, it is clear that petitioner, protected against prosecution by the immunity statute, was not free to withhold his testimony.

3. Petitioner contends that the immunity statute fails to confer complete immunity because it leaves him subject to state prosecution. He suggests (Pet. 13) that this problem "involves three preliminary determinations: (a) Does the constitutional privilege protect the federal witness against divulging matters tending to incriminate under state law; (b) Does the statute purport to and did Congress intend to prohibit state prosecutions; (c) Does Congress have such power under the Constitution?" However, the issue is sufficiently resolved by the answer to the first of these questions: the privilege against self-incrimination under the Fifth Amendment does not extend to possible incrimination under state law.

As petitioner recognizes (Pet. 14), this decisive point was established by a series of cases culminating in *United States* v. *Murdock*, 284 U. S. 141, where the Court said (p. 149):

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection

against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U.S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68.

As the Court pointed out, the principle applies not only to federal immunity statutes but to those of the states, which, of course, cannot and need not preclude federal prosecution to make the grant of immunity effective as a requirement to testify. See *Feldman* v. *United States*, 322 U. S. 487, 491–492; cf. *Regan* v. *New York*, *supra*.

Because the immunity statute need not bar state prosecution, it becomes immaterial to this case whether Congress has undertaken to do so. The question would require decision only if and when a state prosecuted petitioner for matters on which he testified in obedience to the order he has so far defied.[4]

4. Petitioner contends next (Pet. 15–16) that he could not be asked questions as to his Communist Party membership because (a) such in-

[4] Though the answer to this question is, in our view, unnecessary to its decision, the district court considered it at some length, concluding that Congress intended to and did bar state prosecution in the immunity statute here involved (App. 41a–45a).

quiry as forbidden by the First Amendment and (b) the questions were irrelevant to the grand jury's inquiry. Both branches of the argument are erroneous.

In support of his First Amendment claim, petitioner mistakenly attempts to dismiss as irrelevant the cases upholding the power of Congress to inquire into Communist Party membership. *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838; *Lawson* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.). There is nothing in the Amendment, however, to support the suggestion that such inquiry is necessarily forbidden to a grand jury in appropriate cases while it is permitted to a committee of Congress. The experience which teaches that Communist Party membership may be a highly significant fact in legislative investigations concerned with the national security is at least as pertinent for a grand jury, like the one here, inquiring into possible cases of espionage.

And this point disposes as well of petitioner's claim that such questions were irrelevant to the grand jury's business. It may be noted in this connection that the witness "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." *Blair* v. *United States*, 250 U. S. 273, 282; *Nelson* v. *United States*, 201 U. S.

92, 115; *United States* v. *McGovern*, 60 F. 2d 880, 888, 889 (C. A. 2). In any event, it was obviously most relevant to the grand jury's investigation into whether individuals furnished unauthorized information to the Soviet Union to ascertain if such individuals were members of the Communist Party during the period when the information was allegedly furnished. It is difficult to think of a circumstance which would more clearly reflect motive for furnishing such information than membership in an organization which is believed, on powerful evidence, to be part of an international conspiracy centered in the Soviet Union. See, *e. g.*, *Dennis* v. *United States*, 341 U. S. 494; *Communications Assn.* v. *Douds*, 339 U. S. 382, 422 *et seq.* (Mr. Justice Jackson, concurring and dissenting, each in part). It was clear from the very first question propounded to petitioner (App. 3a) that the grand jury was seeking to ascertain what knowledge he had concerning a conspiracy to transmit national defense information to members of the Communist Party and thence to agents of a foreign power during World War II. His testimony relative to his own membership and that of others went to the very heart of the allegations being considered by the grand jury. Petitioner's observation (Pet. 16) that membership in the Communist Party is not a crime is beside the point. Plainly, the bounds of a grand jury's power are not limited to re-

quiring testimony which in itself affirms or denies the commission of a crime. It is equally plain that the testimony petitioner withheld was properly sought by the grand jury in this case.

5. Finally, it is argued (Pet. 16-17) that the district court's order is invalid for failure to contain an express grant of immunity. As we have noted earlier, however (*supra*, p. 7), the immunity has been granted by Congress itself in the terms of the statute. It arises by operation of law when all of the conditions specified in the statute have been met and the witness has testified in compliance with the court's order. This being true, there is no necessity for a grant of immunity in the order itself. At the outset, the order recites that the United States Attorney has made application for an order instructing the appellant to testify "pursuant to the provisions" of the immunity statute (App. 55a). The order specifically states that petitioner is ordered to testify "subject to the provisions" of the immunity statute (App. 57a). Clearly, he is being compelled under the statute and is protected by the statutory immunity from subsequent prosecution touching the subject matter of his testimony. There was no necessity for the court to redefine the immunity in its order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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